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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE ERFTMIER,
Petitioner

v.

ROWAN COMPANIES, INC.,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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QUESTIONS PRESENTED

1. Can reversal of a District Court's findings be allowed to stand when the basis for reversal are facts "found" by the Court of Appeals which have *no* support in the record and which are contrary to facts found by the trial court?

2. Does the permissible scope of review under Fed. R. Civ. P. 52 (a) allow a Court of Appeals to made *de novo* factual determinations contrary to those found by the trial court and supported by the evidence?

3. Whether such conduct by a Court of Appeals (as enumerated above) constitutes a sufficient departure from the accepted and usual interpretations of the "clearly erroneous" standard of review so as to call upon this Court's exercise of supervisory power.

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are contained in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, and is reproduced in the Appendix hereto at p. A-2. The order of the Court of Appeals denying a Petition for Rehearing appears in the Appendix at p. A-8. The judgment of the United States District Court for the Southern District of Texas appears in the appendix at p. A-9 and its findings of fact and conclusions of law are printed in the Appendix at p. A-10.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed in July 28, 1983. A timely Petition for Rehearing was denied by the Fifth Circuit on September 12, 1983.

The statutory provision confering jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fed. R. Civ. P. 52(a) which provides as follows:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state seperately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of

motions under Rules 12 or 56 of an other motion except as provided in Rule 41(b).

The Jones Act, 46 U.S.C. § 688, which provides as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

This is an action by Petitioner, a seaman, against the Respondent vessel owner under the Jones Act, 46 U.S.C. § 688 and general maritime law, for damages arising out of personal injuries sustained by Petitioner while working aboard the Respondent's vessel in November 1980.

Jurisdiction in the court of first instance, the United States District Court for the Southern District of Texas, existed by virtue of 28 U.S.C. § 1331.

Trial was to the court before the Honorable George E. Cire, District Judge. The District Court entered detailed findings of fact and conclusions of law upon which a Judgment in favor of the seaman, Brus Erftmier, was entered against the vessel owner, Rowan Companies, Inc. (Rowan), in the amount of $600,000.

Rowan appealed the judgment to the United States Court of Appeals for the Fifth Circuit attacking the District Court's liability

and damages findings as being clearly erroneous. A quorum[1] of a Fifth Circuit panel reversed and rendered judgment in favor of Rowan, holding that the District Court's findings of unseaworthiness and negligence were clearly erroneous. A summary of the essential liability facts, developed in the trial record, and upon which the District Court's findings of fact were based, is therefore necessary at this point.

In November 1980, Bruce Erftmier was employed by Rowan as a head roustabout aboard the drill tender vessel ROWAN III located in the Gulf of Mexico (T. 12-15). On the date Mr. Erftmier was injured, he was supervising three other crew members who had been assigned to chip, clean, and paint a void or crawl space located on the lower deck of the vessel (T. 16, 24). Mr. Erftmier suffered disabling and permanent injury to his back when he attempted to enter the void or crawl space through a "scuttle hole" which was a small opening or access way in the bulkhead that led to the void area where the other members were working (T. 18). The scuttle hole was located approximately 4 to 5 inches above the deck floor, (T. 179), and was partially obstructed by the presence of hot pipes and an electrical switch or fuse box (T. 18 Plt's EX Nos. 1-4). Becuase of the small size, shape, and location of the scuttle hole in question, Mr. Erftmier bent over, got on his hands and knees, and had to twist and bend to attempt entry at which time he sustained injury (T. 18-19, 57).

Two crew members, whose deposition testimony was offered at trial, detailed that the size and location of the scuttle hole near the deck floor, close to some hot pipes and a fuse box posed obstacles to safe and direct entry to the void area (Johnson depo., at 18; Loftin depo. at 9-11). Seaman Johnson further testified that the pipes and

[1] The panel consisted of Chief Judge Clark, Circuit Judges Goldbert and Politz. Judge Politz recused himself after hearing oral argument and did not participate in the preparation of the opinion.

the fuse box could have been repositioned so as to provide better access to the scuttle hole (Johnson depo. at 19). These witnesses, and Mr. Erftmier, identified potographs of the scuttle hole where the injury took place (T. 21-22; Johnson depo at 13-14; Loftin depo at 9-10; Plt's Ex Nos 1-4).

Estimates of the dimensions of the scuttle hole varied from 1½ to 2 feet high (Johnson depo. at 60; T. 178) and 16 to 18 inches wide (T. 54) to 2½ feet high and 18 to 20 inches whide (T. 99).

Witnesses called live at trial by Rowan included another crew member who testified that the access ways, because of pipes, were difficult to enter (T. 101); and the head supervisor on the vessel testified that the access ways were not only small but somewhat impeded or obstructed by pipes (T. 180).

The principal conflict in the testimony before the District Court concerned previous passage through the scuttle hole into the void or crawl space. Mr. Erftmier testified that he had never been through the hole or in the void to which it led (T. 16,51). Seamen Loftin and Johnson also testified that before this particular work assignment, they had never been in the void area (Johnson depo. 16; Loftin, 11,20). Donald Kervin, a member of the same crew testified, however, that he had been in the void area 200 to 300 times (T. 100, 115-116). Two supervisors aboard the vessel, Nugent and McDonald, testifying live at trial, stated that they too had frequently encountered the access hole (T. 176,137).

Against this factual development in the record, the trial court, after observing Mr. Erftmier's demeanor and credibility as well as that of all witnesses called by Rowan, made the following pertinent findings:

> No. 8. The void space was aft of the boiler room and its entry was through a vertical, oblong access way (sometimes referred to as a scuttle hole), approximately 2-2½ feet high and 18-20

inches wide. The bottom of the access way was approximately 6 inches above the deck.

No. 9. There were one or more steel pipes partially obstructing the scuttle hole leading into the void space.

No. 10. Because of the small size, shape, and location of the scuttle hole, Plaintiff had to stoop and bend his body in order to attempt an entry. During this effort, he injured his back.

* * *

No. 21. Because of the size, configuration, and distance off the deck, the scuttle hole which Plaintiff attempted to crawl through in November 1980, was not a reasonably safe place for Plaintiff to work aboard the vessel.

No. 22. The Defendant was negligent in its failure to provide a reasonably safe place for Plaintiff to work and such negligence was the proximate and/or producing cause of the Plaintiff's injuries.

No. 23. The Defendant's failure to provide a reasonably safe place to work for Plaintiff rendered the vessel unseaworthy and such unseaworthy condition was the proximate and producing cause of Plaintiff's injuries.

(R. 7,9). These findings, against the record detailed above, were held to be clearly erroneous by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT REPEATEDLY CONTAINS AND RELIES UPON FACTS WHICH DO NOT APPEAR IN THE RECORD AND WHICH ARE CONTRARY TO EVIDENCE

WHICH IS IN THE RECORD: SUCH CONDUCT CONSTITUTING A SIGNIFICANT DEPARTURE FROM THE APPROPRIATE SCOPE OF APPELLATE REVIEW AND CALLS FOR AN EXERCISE OF SUPERVISORY POWER BY THIS COURT.

As a basis for the Court of Appeals reversal of the liability findings of the District Court, the opinion alludes to and relies upon matters not in the record. The opinion sought to be reviewed rationalizes with the following, none of which is in the record:

A. "It is also a prevalent practice to locate scuttle holes and hatches several inches above deck level."

B. "The purpose of this practice is to prevent water. . .from flowing between compartments."

C. "In this way standing water may be isolated, and instead of two or more compartments having wet and slippery floors, only one compartment will be affected."

D. "Safety on board, as well as the integrity of the ship, is promoted, not impeded."

(Opinion, p. 6). The record is *completely devoid* of any evidence regarding (A) custom, (B) purpose, (C) effect, or (D) result of so locating scuttle holes. Even so, the fact that the scuttle hole was raised a few inches off of the deck floor was not the basis for the lower court's finding - the basis may well have been that location *higher* off the deck was needed, not that the hole should have been down to the deck.

The Court of Appeals further rationalizes *outside* the record:

E. ". . .many, if not most scuttle holes are found deep in the innards of a ship where pipelines and conduits abound." and

F. "it would be extremely difficult to design all such passageways so that ingress would never be imparied by conduits, valves, meters, beams, fittings, cylinders, or other obstructions."

(Opinion, p. 6). Again, there is *no evidence* in the record of (E) where many or most such holes are located, or (F) design alternative difficulties. The record does not support such "fact findings" by this Court. In fact, the evidence in the record on the point of reasonable alternatives is contrary to that found by the Court of Appeals.[2] The direct evidence of an uncorrected, yet correctable, unsafe condition certainly formed a permissible basis for the trier of fact to determine negligence and unseaworthiness. Futher, such direct evidence *in the record* conflicts with the assertion by the Court of Appeals, *unsupported by the record*, that it would be extremely difficult to design the hole so as not to be impaired by obstructions.

There is further rationalization outside the record by the Court of Appeals in its opinion:

G. ". . .passage through the hole was no more bothersome than many of the normal tasks of a seaman."

H. "The hole was virtually identical in size and shape to many other scuttle holes fould in the Rowan III and other modern vessels."

(Opinion, p. 5-6). Not only is there no evidence to support such a statement by the Court of Appeals, there was direct evidence *to the*

[2] One crewman testified that obstructions to safe ingress and egress could have been eliminated. (Johnson depo. p. 19)

contrary.[3] Futher, the photographic evidence in the record demonstrated that the hole in question was more obstructed than others aboard the vessel. (*Cf* Plt's Ex. 1-4 and Def. Ex. 6A and 6B *with* Def. Ex. 6C, G, and L).

Petitioner respectfully submits that the Fifth Circuit, through these examples above noted, accomplished in its opinion what no trial court, much less an appellate tribunal, can permissibly do; that is, make critical fact findings at the very core of the controversy (the "reasonableness" of the working environment) without evidence in the record for support. These matters, not in the record, which were relied upon by the Court of Appeals and outlined above are hardly matters about which a trial court could have taken judicial notice. *See* Fed. R. Evid. 201. To cause the trial court's judgment to fall because of facts conjured by the Court of Appeals works a manifest wrong to the system of appellate review, for it removes predictablility of result and reliance upon a record developed below if a reviewing tribunal may go outside of the record for support of a contrary result than that which was obtained under the evidence below.

Fed. R. Civ. P. 52(a)'s express mandate, as well as the teachings of this Court and the Fifth Circuit, make clear that deference is to be paid to reasonable inferences drawn from the evidence by the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *McAllister v. United States*, 348 U.S. 19, 20 (1954); *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1947); *McKensie v. Sea Land Service, Inc.*, 551 F.2d 91, 92 (5th Cir. 1977); *Skidmore v. Grueninger*, 506 F.2d 716, 724 (5th Cir. 1975);

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[3] The evidence in the record demonstrates that the hole in question, because of its location and the presence of obstructions, was extremely difficult to enter and required a series of complicated body maneuvers to safely encounter. (T. 18-19, 57; Johnson depo. p. 18; Loftin depo. p. 9-11).

Not only does the Court of Appeals opinion ignore or disregard those inferences made by the District Court, (as discussed *infra*), but goes even further and "creates" evidence from which it concludes a contrary result must follow. Such a gross departure from the traditional concepts of appellate review of fact findings does more than work injustice in the particular case, for it signals an inherent abuse by the Fifth Circuit of its true role. If such conduct is not corrected by this Court, it reduces the special deference and importance which is to be afforded our district courts, sitting as a trier of fact. The entire federal judiciary is harmed if this practice of creating dispostive facts in the Court of Appeals is allowed to stand. This ground, independent of the ground that follows, constitutes sufficient cause for a writ of issue.

II.

IN VIOLATION OF THE DECISIONS OF THIS COURT AND VARIOUS CIRCUITS, THE DECISION OF THE COURT OF APPEALS DISREGARDS AND MISAPPLIES THE PROPER STANDARD OF REVIEW MANDATED BY RULE 52(a) IN SO GREAT A MANNER AS TO COMPEL THIS COURT'S ATTENTION TO CORRECT.

The Fifth Circuit's decision accurately observes that it is not permitted to disturb the District Court's assessment of the vessel owner's liability unless the lower court's findings are clearly erroneous. While recognizing the appropriate standard of review in its opinion, the Court of Appeals nonetheless ignored the directive of decisions by this Court, and the Fifth Circuit itself, regarding how a Rule 52(a) review should be undertaken.

This Court expressly reaffirmed the proper standard of review mandated by Rule 52(a) in *Zenith Corp. vs. Hazeltine*, 395 U.S. 100 (1969) when it stated:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence.

395 U.S. at 123. Where the findings of the trial judge may reasonably be inferred from the record they should not be disturbed on appeal even if conflicting inferences of equal reasonableness may be drawn from the review of the same evidence. *Commissioner v. Duberstein*, 363 U.S. 278, 290-91 (1960); *McKensie v. Sea Land Service, Inc.*, 551 F.2d 91, 92 (5th Cir. 1977); *Skidmore v. Gruginger*, 506 F.2d 716, 724 (5th Cir. 1975).

It is upon this interpretation of the clear error standard of review that Petitioner properly relied in presenting its appeal before the Court of Appeals. It is under this test that the record should have been viewed by the Fifth Circuit. However, Petitioner submits that upon even a cursory examination of the Fifth Circuit opinion, and its effect, it is readily apparent that the Fifth Circuit review was not that of deciding if the District Court could have permissibly found as it did under the record presented, but rather one of merely arriving at a different conclusion. Importantly, the Court of Appeals entirely disregarded, and failed to discuss or to distinguish, the following evidence which was adduced in the District Court and which permissibly supports unseaworthiness and negligence findings:

A. The obstructions to safe ingress and egress at the hole in question could have been eliminated. (Johnson depo. p. 19).

B. The hole, because of its location and the presence of obstructions, was extremely difficult to enter and required a series of complicated body maneuvers to safely encounter. (T. 18-19, 57; Johnson depo. p. 18; Loftin depo. 9-11).

C. The photographic evidence demonstrated that the hole in question was more obstructed than others aboard the vessel. (*Cf.* Plt's Ex. 104 and Def.'s Ex. 6A and 6B *with* Def.'s Ex 6C, E and L).

This evidence alone was permissible support for the trial court in finding that the hole in question was an unsafe place to work although the Court of Appeals ignored or disregarded any such permissible implication by broadly stating that the hole in question was "virtually identical" to others. It was not, as the record above demonstrates.

Other evidence which the Court of Appeals ignored or disregarded, and which permit the District Court findings of liability, is as follows:

D. Witnesses called live by the Defendant testified that the hole was difficult to enter because of the obstructions and its location. (T. 101, 180).

E. There was clear dispute as to the number of safe encounters by other seamen through the hole in question; such dispute going to the issue of "reasonable fitness". (*Cf.* T. 100, 115-16 *with* T. 16, 15; Johnson depo. p. 16; Loftin depo. p. 11, 20).

The Court of Appeals' error in relitigating the disputed facts resolved by the court below is underscored from the opinion itself wherein the Fifth Circuit at one point finds support for its result by observing that the scuttle hole was "passed through" as "part of the ordinary run-of-the-mill duties" of seamen (Opinion p. 6), yet at another point cites as "particularly relevant" to reversal the fact that the hole was rarely entered. (Opinion p. 7). The Court of Appeals stated an "entirely different case" would be presented if the hole was ordinarily or regularly encountered. (Opinion p. 7); a fact, as shown above, the Court noted earlier in the opinion but chose to ignore

when creating the distinction of non-use. Such incongruity is the product of a reviewing court sitting as a second fact finder, passing upon questions of credibility, persuasiveness, and weight to be given the evidence rather than making its proper inquiry under the clear error standard which is to inquire whether there is evidence and reasonable inferences therefrom which allow the trial court to permissibly find as it did. *See McCaughan v. Real Estate Land, Title and T. Co.*, 297 U.S. 606, 606-08 (1935).

A critical element in the instant suit was the credibility of the witnesses who gave testimony regarding the liability facts. The express mandante of Fed. R. Civ. P. 52(a) requires that "due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses". The trial court, as this Court has observed, is in the unique position and has the special opportunity to listen to and observe witnesses and determine if they speak the truth. *Guzman v. Pichirilo*, 369 U.S. 698, 701-03 (1962). *See also, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States v. State of Florida*, 482 F.2d 205, 208 (5th Cir. 1973).

The Fifth Circuit opinion, although not directly questioning the validity of such mandated deference to the lower court, does great disservice to same by disregarding direct evidence which the District Court apparently attached great weight after seeing key witnesses testify live, observing their demeanor, hearing the tenor and persuasiveness of their testimony, and passing upon the weight to be given their evidence. To entirely disregard evidence and reasonable inferences which support the District Court's findings and to adopt conflicting inferences destroys the meaning of decisions interpreting Rule 52(a)'s standard of review which hold a second trial on the merits in the appellate courts must be avoided. Petitioner submits that the Court of Appeals' conduct in the instant case renders Rule 52(a)'s provision of deference to the trial court an empty formalism of words. The proper and consistent application of the clear error standard of review is essential to the integrity of the

judicial system and uniformity of results. If a court of appeals has unbridled authority to disregard or alter controlling facts without explanation then efforts expended by a conscientious district court are wasted. If the clear error standard of review means that a court of appeals can review the same body of evidence and decide the case differently with no deference to the findings below, then our district courts become analogous to an administrative tribunal or board, whose determinations are reviewable *de novo*. This is precisely the evil recognized by this Court and sought to be avoided in its decision in *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123 (1969).

The clear error standard is limited to correcting mistakes by the district court in arriving at fact findings which are *impermissible* under the record. The record in this case certainly contains evidence which permits findings of liability; that is, which created a fact dispute and provided the trier of fact with sufficient evidence to resolve the issue as it did. The true function of a court of appeals is to compare the record evidence and findings against settled principles of law. It is not the function of the Fifth Circuit to relitigate the controversy. The question of "reasonable fitness" of the scuttle hole was presented as a fact dispute in the trial court and was permissibly resolved in favor of the seaman.

Petitioner's judgment was not reversed because of the application of a wrong theory of liability or other error of law. That such is the case is evident from the fact that the Court of Appeals' opinion neither discusses nor decides any point of law but merely outlines evidence which it rationalized supports a different result from that which obtained in the trial. Perhaps a different trier of fact would have reached a different conclusion. However, the Court of Appeals is not to sit as a new fact finder, and even a choice between two permissible views of the evidence does not render one view clearly erroneous. *United States v. Yellow Cab*, 338 U.S. 338, 342 (1949).

This Court's decision in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) is also instructive as to the proper role of

an appellate court reviewing the actions of a fact finder. Although, in *Sentilles* this Court reversed the court of appeals in reinstating a *jury's* verdict, the following teachings from that case have meaning here:

> It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. . .Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges felt that other results are more reasonable.

The Fifth Circuit has improperly substituted its own conclusions for those of the trial court, sitting as a fact finder. Such represents so substantial a departure from the accepted and usual course of judicial proceedings as to require and compel this Court to exercise its powers of supervision over the courts of appeals. Certiorari is warranted in the instant case, not merely to bring justice to the respective litigants, but also to establish that a court of appeals may not set aside findings of a district court which have reasonable support in the record, substituting instead their own *de novo* view of the case which entirely disregards or fails to expain evidence to which the fact finder attached weight. The Court of Appeals' opinion creates a dangerous precedent and is unfair to this Petitioner.

The Fifth Circuit's error in considering and relying upon matters not in the record, together with its improper application of Rule 52(a)'s standard of review, has the cumulative effect of producing an opinion which is not the product of an examination of the full record, with appropriate deference paid to the trial court's findings. Instead, the opinion represents an *ab initio* determination by the Fifth Circuit of the central liability fact question. A redetermination has been made by the Court of Appeals on the basis of matters not in the record and upon the recitation of "facts" which conflict with those found

by the trial court, upon evidence presented, and which have obvious support in the record.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit works a manifest injustice to the rights of Petitioner from which there is no effective relief by reason of the improper substitution by the appellate court of its views and judgment of facts different from that permissibly found by the District Court. This case, therefore, poses serious questions of importance not only to these litigants but central to the effective administration of justice in the federal appellate judiciary. Petitioner, therefore, respectfully prays that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DON R. RIDDLE

DAVID D. WILLIAMS

Attorney for Petitioner

November 2, 1983

CERTIFICATE OF SERVICE

I, Don R. Riddle, hereby certify that on the 7th day of ~~September~~ November, 1983 I mailed certified mail, return receipt requested, 40 copies of this petition to the Clerk, U.S. Supreme Court; and mailed 3 copies, certified mail, return receipt requested to Mr. Theodore Goller, Fulbright & Jaworski, 800 Bank of the Southwest Building, Housto , Texas 77002, Counsel for Respondent.

Don R. Riddle

DON R. RIDDLE

APPENDIX

APPENDIX INDEX

Opinion of the U.S. Court of Appeals for the Fifth Circuit, Bruce Erftmier v. Rowan Companies, Inc., dated July 28, 1983 ..... A-2

Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing, Bruce Erftmier v. Rowan Companies, dated September 12, 1983 ..... A-8

Judgment of the U.S. District Court for the Southern District of Texas, Bruce Erftmier v. Rowan Companies, Inc. A-9

Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Bruce Erftmier vs. Rowan Companies, Inc. A-10

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-2465

BRUCE ERFTMIER,
Plaintiff-Appellee,

versus

ROWAN COMPANIE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(JULY 28, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges*. CLARK, Chief Judge:

Bruce Erftmier was employed by Rowan Companies, Inc. as a head roustabout on board its vessel, the ROWAN III. Erftmier injured his back during the course of performing his duties. He brought this action pursuant to the Jones Act, 46 U.S.C. § 688, and

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* Judge Politz recused himself after hearing agrument. He did not participate in the preparation of this opinion by a quorum of the court. 28 U.S.C. § 46(d).

general maritime law alleging that his injury was caused by the negligence of his employer and the unseaworthiness of the ROWAN III. After a bench trial, the district court held in favor of Erftmier on both claims and awarded him $600,000. Rowan appeals. It argues that the critical finding of the district court that the design of an access hole created an unreasonably dangerous working condition was clearly erroneous. We agree, and reverse and render judgment here in favor of Rowan.

Erftmier supervised a crew of three roustabouts. His crew was assigned to repaint a void space located beneath a bathroom on the port side of the ROWAN III. The void space was immediately aft of the boiler room. The space contained numerous pipes, beams, and columns of various shapes and sizes. The purpose of the space was to allow access to those pipes and supports. The area was not used on a regular basis for any other purpose. The space was approximately three and one-half feet high. It was illuminated by a temporary work light.

Access to the void space was gained through an oval opening cut into the steel bulkhead that separated the space from the boiler room. The bulkhead was less than an inch thick at the place of the opening. The hole measured two and one-half feet high at its highest point and tenty inches at its widest. The bottom of the hole was six inches above the deck.

An electrical junction box was attached to the bulkhead immediately above the hole. The box stood out about five inches from the bulkhead. Two electrical conduits led down from inside the box. One conduit bent ninety degree and proceeded almost horizontally to the right. The other conduit proceeded downward, but then bent into a U-shape and proceeded toward the ceiling. Both conduits were fastened to the bulkhead. Both were roughly one inch

in diameter. The U-shaped conduit partially obstructed entry into the access hole. The conduit that was bent horizontally obstructed the hole very little if at all.

Off to the left of the access hole was a large cylindrical tank of the kind used to store hot water. A very large pipe passed below the hole close to the bulkhead. At a higher level, and somewhat further from the bulkhead, was a smaller pipe. The pipe made several angled turns. Numerous fittings, valves, faucets, dials, and other appendage were attached to the pipe. It was necessary for a seaman to cross over these pipes to get to the access hole. The presence of these pipes made entry into the hole more difficult than it would have been in their absence.

The roustabouts in Erftmier's crew had already been working in the void space without him for two days when he attempted to enter through the access hole in order to check their progress. As he stooped down and attempted entry, Erftmier felt a sharp pain in his leg. The pain was eventually diagnosed as the outward evidence of a back injury. The injury required surgery. Despite the operation, Erftmier remains disabled. As a result of the incident, his ability to continue employment as a physical laborer has been permanently impaired.

The district court found that, because of its size, configuration, location, and distance off the deck, the access hole was not a reasonably safe place for work aboard the vessel. The court concluded that Rowan was negligent in its failure to provide a reasonably safe work environment, and its negligence caused Erftmier's injury. The court also found that Rowan's failure to provide a reasonably safe work place rendered the ROWAN III unseaworthy. It is these findings that Rowan contends are clearly erroneous.

Under the Jones Act, a vessel owner will be deemed negligent if he fails to exercize reasonable care to maintain a reasonably safe work environment. Michalic v. Cleveland Tankers, Inc., 364 U.S.

325, 327 (1960); Verrett v. McDonough Marine Service, No. 82-3001, slip. op. 4700, 4704 (5th Cir. May 31, 1983); Ober v. Penrod Drilling Co., 694 F.2d 68, 70 (5th Cir. 1982); Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1193 (5th Cir. 1982). This court may not disturb the district court's assessment of the owner's negligence unless the court's finding is clearly erroneous. *Verritt*, slip op. at 4704; *Ober* at 70.

A vessel is unseaworthy if it and its appurtenances are not reasonably safe and fit for their intended use. Mitchell v. Trawler Racer, Inc., 363 U.S. 539, 550 (1960); *Ceja* at 1193; Stevens v. East-West Towing Co., 649 F.2d 1104, 1107 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1007 (1982). Again, the district court's findings with respect to the vessel's seaworthiness are entitled to clearly erroneous review. *Ober* at 70. The burden of proving unseaworthiness and negligence is on the seaman. Loehr v. Offshore Logistics, Inc., 691 F.2d 758, 762 (5th Cir. 1982).

A review of the record leaves us with a definite and firm conviction that a mistake has been made. There is no question that a seaman was required to bend over in order to pass through the access hole. It is likewise true that the conduits, pipes and associated hardware made entry more difficult. But passage through the hole was no more bothersome than many of the normal tasks of a seaman. The job by its very nature is an arduous one. In the ordinary course of his duties, a typical seaman must bend over and reach up. He must lift heavy objects, work in confined spaces, and traverse wet and inclined decks. He must climb down ladders, pass through scuttle holes, manuever in difficult areas, and negotiate narrow catwalks. He must operate intricate equipment, handle potentially dangerous tools, suffer the wrath of the elements, and work long, weary hours. "There are inevitable hazards--some of a very severe nature--in the calling of those who go to the sea in ships, hazards which when not occasioned by negligence or unseaworthiness, have to be borne by those who follow the calling." Massey v. Williams-McWilliams, Inc., 414 F.2d 675, 678 (5th Cirs),

cert. denied, 396 U.S. 1037 (1969). It is the responsibility of the owner to supply a *reasonably* safe work environment in which the seaman can perform his demanding duties, not an accident-free ship. *Trawler Racer, Inc.*, 362 U.S. at 550.

If the size and shape alone of the access hole rendered the ROWAN III unseaworthy, then record testimony indicates that almost every modern ship of a substantial size is unseaworthy. The hole was virtually identical in size and shape to many other scuttle holes found in the ROWAN III and other modern vessels. Several seamen testified that they had passed through such holes, and particularly this hole, without incident. They testified that passage through such holes is part of the ordinary, run-of-the-mill duties of a roustabout.

It is also a prevalent practice to locate scuttle holes and hatches several inches above deck level. The purpose of this practice is to prevent water that may collect on some portions of a deck from flowing between compartments. In this way, standing water may be isolated, and instead of two or more compartments having wet and slippery floors, only one compartment will be affected. Safety on board, as weell as the integrity of the ship, is promoted, not impeded.

The record, including photographic evidence, shows that it was necessary for a seaman to negotiate two pipes and avoid two small electrical conduits in order to enter the hole. But many, if not most scuttle holes are found deep in the innards of a ship where such pipelines and conduits abound. It would be extremely difficult to design all such passagways so that ingress would never be imparied by conduits, valves, meters, beams, fittings, cylinders, or other obstructions. This is especially true when the hole must be located below a bathroom and beside a boiler room.

Of particular relevance is the fact that the void space was rarely entered. The only need to enter the area was to do maintenance work. As a result, long stretches of time would pass during which no

crew members would go into the area. We woul be presented with an entirely different case if the hole provided access to a dining or sleeping area, a workshop, or a regularly used storage area.

The court's finding that the access hole created an unreasonably dangerous working environment is clearly erroneous. Because the court's conclusions that Rowan was negligent and that the ROWAN III was unseaworthy were completely dependent on this finding, we reverse. Because no further factual development is called for, we render judgment here for Rowan.

REVERSED AND RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2465

BRUCE ERFTMIER,
Plaintiff-Appellee,

versus

ROWAN COMPANIES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

(September 12, 1983)

ON PETITION FOR REHEARING

Before CLARK, Chief Judge, and GOLDBERG, Circuit Judges.*
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

* This order is being entered by a quorum of this court pursuant to 28 U.S.C. § 46.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUCE ERFTMIER

vs.

ROWAN COMPANIES, INC.

C.A. NO. H-81-2475

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this date, the Court hereby ORDERS:

that Plaintiff have judgment against Defendant in the amount of six hundred thousand dollars ($600,000) with interest at 10.41% from the date of judgment until paid;

that costs of Court are taxed to Defendant.

This is a FINAL JUDGMENT.

SIGNED AND ENTERED this 4th day of October 1982.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUCE ERFTMIER

vs.

ROWAN COMPANIES, INC.

C.A. NO. H-81-2475

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court on Tuesday, September 21, 1982 and oral argument was concluded on Wednesday, September 22, 1982. The Court heard all the evidence, the counsel's arguments of law, and rendered judgment for Plaintiff in the amount of $600,000.

Findings of Fact

1. The Plaintiff, Bruce A. Erftmier, a seaman/roustabout, brought this action against his employer, Rowan companies, Inc., the owner and operator of the Drilling Tender ROWAN III, to recover damages for personal injuries he sustained on board the vessel on or about November 30, 1980.

2. Plaintiff's cause of action was brought pursuant to the Jones Act, 42 U.S.C. § 688, and the General Maritime Law of the United States.

3. The Plaintiff, at all times material hereto, was and now is a resident of the State of Texas.

4. The Defendant, Rowan Companies, Inc., was at all material times hereto the owner and operator of the vessel, a drilling

tender barge without motor power. The D/T ROWAN III was anchored alongside an offshore oil well drilling platform off the coast of Louisiana, in the Gulf of Mexico, and served as a tender to Rowan Rig 11, which was located on the platform.

5. Defendant no longer owns D/T ROWAN III, which was sold to South Texas Offshore Drilling Company, Inc. in January 1982.

6. On the date of the incident leading to this suit, the Plaintiff was classified as a head roustabout and had three other roustabouts in his crew, Robert Johnson, Paul Loftin, and Donald Kervin. The roustabout crew was chipping rust and cleaning and painting a void space located beneath a bathroom on the port side of the vessel.

7. The roustabouts in the Plaintiff's crew had been chipping, cleaning, and painting in the void space for approximately two days when he attempted to enter the void space to supervise their work.

8. The void space was aft of the boiler room and its entry was through a vertical, oblong access way (sometimes referred to as a scuttle hole), approximately 2 - 2½ feet high and 18 -20 inches wide. The bottom of the access way was approximately 6 inches above the deck.

9. There were one or more steel pipes partially obstructing the scuttle hole leading into the void space.

10. Because of the small size, shape, and location of the scuttle hole, Plaintiff had to stoop and bend his body in order to attempt an entry. During this effort, he injured his back.

11. Although Plaintiff expereinced pain in only his leg at the time, subsequent medical eximinations determined that the pain he experienced in his leg derived from an injury to his back.

12. Although Plaintiff did not recall specifically mentioning the incident to other crewmembers, he testified that he did cry out at

the time of his injury. Seaman Loftin testified on deposition that he heard Plaintiff groan or cry out at the time.

13. Plaintiff did not report this incident to his supervisor at the time, but continued to complete his hitch before being retured to shore on a regular rotational schedule. He stayed off his leg for most of the time during his week off because he thought he had merely pulled a muscle.

14. During his next hitch on the vessel, Plaintiff tried to continue his duties as head roustabout, but the pain became worse and he had difficulty walking.

15. Still believing that his problems lay with the muscle in his leg, Plaintiff saw his regular physician, Dr. Joseph Davidow, about three time during the month of December 1980. At the end of the third visit Dr. Davidow speculated that the problem was an injury to the back rather than his leg and Dr. Davidow referred him to a hospital. Upon Defendant's suggestion, however, Plaintiff instead made an appointment with Dr. Robert A. Fulford.

16. Under Dr. Fulford's care, Plaintiff was admitted to St. Luke's Hospital on January 11, 1981. While there, Plaintiff underwent lumbar spine X-rays, a lumbar myelogram and discogram, a CAT scan, and various other tests. The physician's diagnosis at the time was that there was a bulging of the L5-S1 disc, or degenerative lumbar disc disease. Plantiff however was released from the hospital on January 22, 1981 without surgery because the physician felt that further conservative treatment at home could improve Plaintiff's situation.

17. After an aggravating incident, Plaintiff was finally admitted for surgery on February 5, 1981. On February 6, 1981, Plaintiff underwent a lumbar laminotomy. Plaintiff testified that as a result of this surgery a majority of the pain that he had previously exprienced was relieved.

18. Plaintiff returned to work in about May of 1981. Although he resumed the position of head roustabout on the same vessel, he subsequently requested to be dropped to the position of a regualr roustabout because the position of head roustabout required too much physical activity for his impaired condition.

19. A second incident on board the vessel further aggravated Plaintiff's back pain. As the deposition of Dr Fulford evidences, the date of the second incident was on or before November 9, 1981.

20. After the second event Plaintiff took some time off from work because he did not feel physically capable of the job requirements. When he returned to the vessel later that month he was terminated.

21. Because of the size, configuration, and distance off the deck, the scuttle hole which Plaintiff attempted to crawl through in Novebmer 1980, was not a reasonably safe place for Plaintiff to work aboard the vessel.

22. The Defendant was negligent in its failure to provide a reasonably safe place for Plantiff to work and such negligence was the proximate and/or producing cause of the Plaintiff's injuries.

23. The Defendant's failure to provide a reasonably safe place to work for Plaintiff rendered the vessel unseaworthy and such unseaworthy condition was the proximate and producing cause of Plaintiff's injuries.

24. Plaintiff performed his job in a manner that was reasonably expected of him, *i.e.* he did exactly what he was told to do by his supervisors. The Plaintiff was merely attempting to perform the tasks assigned to him by Defendant and he was not guilty of contributory negligence in any degree.

25. As a direct result of the incident in question, Plaintiff suffered serious injuries to his back and body generally, which required medical care and treatment, including back surgery.

26. Plaintiff has not yet fully recovered from his injuries and will undoubtedly require additional medical treatment in the future. Plaintiff is still experiencing a great deal of pain from the injury he received in November 1980 and will continue to do so in the future. His ability to obtain and retain employment has been permanently imparied.

27. For physical pain, mental suffering, physical impairment, and loss of earnings, both past and future, Plaintiff has sustained $600,000 in damage for which he is due compensation from Defendant.

Conclusions of Law

1. At all times material hereto the Plaintiff was a seaman and member of the crew of Drilling Tender ROWAN III, a vessel in navigation as that term is known in maritime law, and as such is entitled to all the protections and remedies afforded a seaman under the Jones Act, 46 U.S.C. § 688, and the General Maritime Law of the United States. *See Producers Drilling Company v. Gray*, 361 F.2d 432 (5th Cir. 1966).

2. The doctorine of unseaworthiness and seamans' personal injury actions "comtemplates that a ship's hull, gear, applicances, ways, appurtenance and manning will be reasonably fit for its intended purpose." 2 M. Norris, THE LAW OF MARITIME PERSONAL INJURIES 3d, § 298 at 1 (1975 & Supp. 1982). *See Mitchell v. Trawler Laser, Inc.*, 362 U.S. 3539, 80 S. Ct. 926 (1960); *Webb v. Dressler Industries, 536, F.2d 603, 606 (5th Cir. 1976), cert. denied*, 429 U.S. 1121, 97 S. Ct. 1157 (1977); *Wilkerson v. Teledyne Movable Offshore, Inc.*, 496 F. Supp. 1279, 1284 (E.D. Tex. 1980).

3. The doctrine of unseaworthiness extends to the ship-owner's duty to provide the crew of a vessel with a reasonably safe place in which to work. *Rogers v. United States, 452 F.2d 1149, 1154 (5th Cir. 1971); Corraro v. M/V ACT III*, 359 F. Supp. 1160,

1163-64 (S.D. Fla. 1973). The Drilling Tender ROWAN III was unseaworthy in that, because of its size, shape and location, the entranceway to the void or crawl space did not provide for safe ingress to and egress from the void or crawl space. This unseaworthy condition was aproximate cause of Plaintiff's injuries.

4. In Jones Act negligence cases, the employer's negligence need be only slight and then need be merely a contributing cause of Plaintiff's injuries. *Reyes v. Vantage Steamship Co.*, 609 F.2d 140, 146 (5th Cir. 1980); *Wilkerson, supra* at 1284.

5. Defendant was negligent because it failed to provide a safe place for Plaintiff to perform his assigned tasks.

6. Plaintiff was merely performing the work that he had been assigned by Defendant and his acts did not constitute any contributory negligence.

7. For past and future physical pain, mental suffering, physical impairment, and loss of earnings, Plaintiff is entitled to recover of and from Defendant the sum of $600,000.

8. In the event that any of the foregoing findings of facts are properly conclusions of law, they are so adopted. In the event that any of the preceding conclusions of law are more properly findings of fact, they are so adopted

SIGNED AND ENTERED this 4th day of October 1982.
October 1982.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
DEC 8 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE ERFTMIER,
Petitioner

v.

ROWAN COMPANIES, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the trial court in a bench trial committed clear error in finding the defendant, a Jones Act employer, negligent and defendant's vessel unseaworthy for requiring the plaintiff, a young and apparently healthy seaman with no history of back problems, to enter an access hole measuring 2½ feet high by 18-20 inches wide that led to a void space beneath a bathroom on the vessel, where the *undisputed* evidence proved not only that hundreds of entrances and exits had been made into and out of the same access hole without any incident of injury, but that other comparable vessels are similarly constructed, and further that the only occasion anyone had to enter the access hole was to perform maintenance in order to keep the vessel seaworthy.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court:

Respondent, Rowan Companies, Inc. (hereinafter "Rowan" or "Employer"),* respectfully submits this its Brief in Opposition to the Petition for Writ of Certiorari filed by Bruce Erftmier (hereinafter "Erftmier") and respectfully prays the Court deny issuance of the writ.

OPINIONS BELOW

Petitioner correctly reproduced in his petition the opinions of the courts below.

* Rowan's heretofore unnamed affiliate, Perfedoria Guerra Negro is listed here in compliance with Rule 28.1.

JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(1), but Respondent shows there are no "special and important reasons" as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

STATUTES INVOLVED

Petitioner, though contending that the Jones Act, 46 U.S.C. § 688, and Rule 52(a) of the Federal Rules of Civil Procedure are involved in this case, does not contend that any construction of those statutes is necessary in this Court. Respondent submits that those statutes, while pertinent to the case, are not involved in the sense of requiring any clarification or construction.

The Jones Act, 46 U.S.C. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Respondent cannot accept the statement of the case presented by Petitioner. Respondent respectfully contends Petitioner's statement suffers from significant omissions and inaccuracies both with respect to the facts as contained in the record and with respect to the opinion of the court of appeals.

Petitioner filed an action in the United States District Court for the Southern District of Texas, in which he claimed damages under the Jones Act and under the

General Maritime Law as a result of a back injury he alleges he sustained in November 1980 while employed as a head roustabout on Respondent's drilling tender vessel, the ROWAN III. (R. 110). In essence, Erftmier claimed that because of the size and location of an access hole leading to a void space beneath a bathroom, through which access hole Erftmier was attempting to pass when he says he hurt his back, Rowan was negligent for failing to provide Erftmier with a reasonably safe place to work and that the vessel was, therefore, unseaworthy. (T. 12-19).

The district court, in a bench trial, agreed with Erftmier and awarded him $600,000. (R. 9).[1]

---

1. The dispositive findings of fact made by the trial court are as follows:

> 8. The void space was aft of the boiler room, and its entry was through a vertical, oblong access way (sometimes referred to as a scuttle hole), approximately 2-2½ feet high and 18-20 inches wide. The bottom of the access way was approximately 6 inches above the deck.
>
> 9. There were one or more steel pipes partially obstructing the scuttle hole leading into the void space.
>
> 10. Because of the small size, shape and location of the scuttle hole, Plaintiff had to stoop and bend his body in order to attempt an entry. During this effort, he injured his back.
>
> * * *
>
> 21. Because of the size, configuration, and distance off the deck, the scuttle hole which Plaintiff attempted to crawl through in November 1980, was not a reasonably safe place for Plaintiff to work aboard the vessel.
>
> 22. The Defendant was negligent in its failure to provide a reasonably safe place for Plaintiff to work and such negligence was the proximate and/or producing cause of the Plaintiff's injuries.
>
> 23. The Defendant's failure to provide a reasonably safe place to work for Plaintiff rendered the vessel unseaworthy and such unseaworthy condition was the proximate and producing cause of Plaintiff's injuries.
>
> (R. 7, 9).

The undisputed evidence in this case was as follows: As of the date of Erftmier's alleged injury,[2] he had been employed for about ten months either as a roustabout or as a head roustabout on the ROWAN III, a drilling tender vessel located offshore Louisiana in the Gulf of Mexico. On the date in question, and for two days immediately preceding that date, Erftmier had been supervising the work of a crew of three roustabouts: Paul Loftin, Donald Ray Kervin, Jr., and Robert Johnson (T. 24). For two days the crew had been chipping rust from a void space beneath a bathroom area on a lower deck of the vessel (T. 16). The void space was between three and three and one-half feet high and principally contained water pipes from the bathroom overhead (T. 99, 170). The bathroom area and the void space in question were aft of a boiler room and the whole area contained a great many pipes and valves (T. 50).[3]

Chipping the rust from the metal surfaces of the void space and repainting the same ~~was~~ were necessary to keep the

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2. The exact date of Erftmier's alleged injury is uncertain, because Erftmier could not pinpoint the date. The crew on the ROWAN III worked seven days on and seven days off (T. 14). When aboard the vessel, the crew worked twelve hour watiches (T. 14). The period of employment during which Erftmier claims he was injured began on November 27 and ended on December 4, 1980 (T. 198, Def's Ex. 2A-2C). He did not know the actual date of the alleged incident where he contends he was injured (T. 24). Neither did he know the time of day of the incident (T. 55). Erftmier, by his own admission, did not tell any of his superiors (or anyone else for that matter) on the tender that he had been injured, and he did not at that time fill out an accident report form (T. 59-60). However, if he is to be believed, the incident occurred about halfway through a week-long hitch in November, so that November 30 seems to be the most likely date that fits those facts (T. 20).

3. Photographic evidence showing the access hole in question and the entire area surrounding the void space was in the record and before the court of appeals. See, in particular, Pl. Ex. No. 3.

vessel seaworthy and to enable the vessel to pass United States Coast Guard inspections (T. 137, 174). Access to the void space was by way of an oblong, oval hole in the bulkhead, and the access hole measured about two and one-half feet high by eighteen to twenty inches wide (T. 99). The access hole was six inches off the deck (T. 99). Donald Ray Kervin, Jr., one of the roustabouts who was working in the void space at the time Erftmier attempted to pass through the access hole, testified he had been into access holes such as the one in question about 200-300 times (T. 100). Prior to his employment with Rowan, Kervin had been employed by Avondale Shipyard in New Orleans and had been engaged in the construction of vessels like the ROWAN III (T. 122). Kervin testified that all access holes leading into the void spaces on similar vessels are of about the same size (T. 122-123).

Erftmier testified he went to check on the progress of the crew and squatted down in preparation for entering the access hole (T. 19). As he was sticking his head through the hole, he felt a sharp pain in his left leg (T. 19). Erftmier does not contend there were any foreign substances on the floor or that there was bad lighting (T. 57).[4] His sole contention of negligence and

4. Erftmier's verbatim testimony is as follows:

Q. Are you telling the court the only thing that occurred was that you went down to enter this accessway into the void space and you—what did you do? Did you kneel down or did you stoop down or bend down or what did you do?

A. Well, I can't remember the exact motion that I used to get into the hole. As I recall, the closest I remember I made a stooping motion, got down on my hands and knees and had to twist my shoulder to pass through the hole.

Q. And you never did get through?

A. No, sir, I didn't.

Q. You didn't slip and fall?

of unseaworthiness of the vessel is confined to the size and location of the access hole (T. 57). He argues that because there were water pipes and electrical conduits in the vicinity of the access hole and because the access hole was no larger than it was, Rowan failed to furnish him a reasonably safe place to work (T. 57).

The *undisputed* evidence in the record shows that over a period of many years numerous seamen made hundreds of entrances and exits from the access hole in question prior to Erftmier's alleged injury, and there is no evidence of any injury to anyone other than Erftmier.[5]

A. No, sir.
Q. The lighting didn't have anything to do with the injuries you sustained or lack of lighting?
A. I don't remember.
Q. No other injury on the vessel? Just that you had to enter a confined space?
A. Very confined.
Q. That is the only contention you are making as to anything wrong on the vessel the confined space?
A. Yes, and possibly the location.
Q. And that is the same space the other men had gone in and out of when they were working a couple of days?
A. To the best of my knowledge.
(T. 57-58).

5. Petitioner's statement on page 8 of his petition in this Court that, "the principal conflict in the testimony before the District Court concerned previous passage through the scuttle hole into the void or crawl space," is simply not true. As detailed above, there was undisputed evidence from workers who had worked on the vessel for substantial lengths of time that they had been in and out of the access holes on the vessel, including the access hole in question, numerous times and had never been injured. Loftin and Johnson, the two roustabouts in Erftmier's crew, who Petitioner says had never been through an access hole, had only been employed on the vessel for ten months and six months respectively. Moreover, Loftin and Johnson had been in and out of the access hole many times during the two days preceding Erftmier's alleged injury, and neither of them had been injured.

Kervin testified he had never heard of anyone being injured while entering the access hole in question or any other access hole (T. 106). Omar Nugent, the tender's superintendent and Erftmier's superior, had been employed on Rowan tenders over 14 years, and he knew of no one who had ever been injured entering an access hole (T. 176-177). Nugent is six feet tall, weighs 260 pounds and has a 44-inch waist (T. 173). He had gone through the access hole four or five times himself (T. 176).

Paul McDonald, the tender's crane operator and Erftmier's immediate supervisor, had been employed on the ROWAN III for over 19 years (T. 134). He testified it was necessary two or three times each year to perform the type of maintenance Erftmier's crew was performing (T. 136). McDonald had been in and out of the void space, for various reasons, hundreds of times (T. 137). Coast Guard inspectors had also been into the void space (T. 137).

All the roustabouts who were working in the void space testified that because of the presence of the bathroom overhead, water had to be mopped up from the floor of the void space before work could begin (T. 100; Loftin p. 11).[6]

The undisputed medical evidence showed that at the time of Erftmier's alleged injury, unknown to either Erftmier or Rowan, Erftmier had a pre-existing cogenital or developmental abnormality in his spine, consisting of

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6. Reference to deposition testimony, which was not included in the transcript pagination, will be by the name of the deponent followed by the page number of the deposition where the testimony is located.

smaller than usual openings in the spine where the nerves of the spinal cord exit. (Fulford, p. 22).

SUMMARY OF ARGUMENT

The petition for a writ of certiorari in this case should be denied for the following reasons: (a) the decision of the court of appeals turns strictly on the facts of this case and involves not only no *important* questions of law, but no questions of law at all; (b) a decision by this Court would have no precedential value, because the decision of the lower court is dependent solely on the facts; and (c) the decision of the court of appeals is correct, notwithstanding the errors alleged by Petitioner.

ARGUMENT

I.

BECAUSE THE DECISION OF THE COURT OF APPEALS INVOLVES NO IMPORTANT LEGAL ISSUES, BUT DEPENDS ENTIRELY ON FACTUAL MATTERS, THE PRESENT CASE IS NOT AN APPROPRIATE ONE FOR THE EXERCISE OF THE COURT'S DISCRETIONARY CERTIORARI POWERS

Petitioner bases his request for this Court to exercise its discretionary power to issue a writ of certiorari solely upon a notion that this Court should exercise a general "supervisory power" over courts of appeals. Petitioner argues that, *considering the facts of this case*, the court of appeals so misapplied the law that justice demands this Court intervene and correct the error of the court of appeals. Every losing party at the level of the court

of appeals feels inclined, no doubt, to make that same argument, and if Petitioner's misconception of this Court's function were accepted, every losing party in the court of appeals *would* make that same argument.

The function of this Court's certiorari power, as the Court has itself stated many times and as reflected in Rule 17, is not to enable the Court to act as a higher level court of appeals. The writ of certiorari should be reserved for cases involving legal issues of general importance.[7] This Court does not "sit for the benefit of the particular litigants."[8]

The instant case clearly involves no important legal issues of general concern. On the contrary, this case involves no legal issues at all. The briefest reading of the petition in this case reveals that not even the Petitioner claims any novel or important legal issues are presented. His sole ground for urging issuance of the writ is based upon an obvious misinterpretation of that part of Rule 17 that allows this Court to exercise its "power of supervision" where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings" as to warrant such a supervisory role. Petitioner's attempt to squeeze this case into that narrow niche is unpersuasive.

That part of Rule 17 just quoted refers to wide departures from accepted procedures.[9] Petitioner makes no

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7. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

8. *Rice, supra*, 349 U.S. at 74.

9. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976).

contention that the court of appeals failed to recognize or use the appropriate standard of review. Petitioner concedes the court properly recognized and used the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. Petitioner's argument is really no more than a contention that the court of appeals should not have concluded the findings of the trial court were clearly erroneous.

Even assuming *arguendo* that Petitioner was correct, the role of this Court is not to correct alleged errors that affect only the private parties to the litigation. In any event, the undisputed evidence in this case demonstrates that the court of appeal's decision was a correct one.

II.

THOSE PORTIONS OF THE OPINION OF THE COURT OF APPEALS THAT PETITIONER CLAIMS ARE FINDINGS OF FACT ARE NOTHING MORE THAN COMMON SENSE INFERENCES FROM UNDISPUTED EVIDENCE AND ARE, IN ANY EVENT, UNNECESSARY TO THE CORRECTNESS OF THE DECISION

Petitioner complains that the court of appeals engaged in *de novo* fact finding that was not based on anything in the record. In particular, Petitioner points to the portions of the opinion of court of appeals where the court observed (1) that access holes and hatches are raised above the level of the deck in order to prevent water from flowing between compartments, (2) that designing access holes so that they would never be near pipes would be difficult, (3) that passage through the access hole was no more bothersome than many normal tasks

of a seaman, and (4) that all ships contain similar access holes.

The answers to Petitioner's complaint are many: first, the so-called findings of fact are nothing more than commonsense inferences based on undisputed evidence[10] in the record; second, whether the method of construction of the access hole is generally followed on other vessels is not vital because in the circumstances of the present case the method of construction was prudent and necessary; and third, there was direct uncontradicted evidence in support of the observations of the court of appeals.

Most important, however, is the fact that the so-called findings of fact were not dispositive of the case, as Petitioner would have the Court believe, but were, in fact, incidental to the court of appeals' decision. The heart of the decision of the court of appeals is as follows:

> A review of the record leaves us with a definite and firm conviction that a mistake has been made. There is no question that a seaman was required to bend over in order to pass through the access hole. It is likewise true that the conduits, pipes and associated hardware made entry more difficu't. But passage through the hole was no more botherso.ne than many

10. Petitioner argues repeatedly that the court of appeals misapplied Rule 52(a), F.R.C.P., by failing to give due deference to the trial court's opportunity to observe the demeanor of the witnesses and to weigh the evidence. Petitioner fails to mention, however, that the two witnesses on whom he placed his greatest reliance, Johnson and Loftin, testified *by deposition*. More importantly, the matter of the size and location of the access hole and the general layout of vessel surrounding the hole was not in dispute. In fact, the evidence on that subject was largely photographic evidence, on which the court of appeals stated expressly it relied. Thus, the court of appeals was in as good a position as the trial court to determine from undisputed evidence whether the access hole was unreasonably unsafe.

> of the normal tasks of a seaman. The job by its very nature is an arduous one. In the ordinary course of his duties, a typical seaman must bend over and reach up. He must lift heavy objects, work in confined spaces, and traverse wet and inclined decks. He must climb down ladders, pass through scuttle holes, manuever in difficult areas, and negotiate narrow catwalks. He must operate intricate equipment, handle potentially dangerous tools, suffer the wrath of the elements, and work long, weary hours. "There are inevitable hazards—some of a very severe nature—in the calling of those who go to sea in ships, hazards which when not occasioned by negligence or unseaworthiness, have to be borne by those who follow the calling." *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 678 (5th Cir.), *cert. denied*, 396 U.S. 1037 (1969). It is the responsibility of the owner to supply a *reasonably* safe work environment in which the seaman can perform his demanding duties, not an accident-free ship. *Trawler Racer, Inc.*, 362 U.S. at 550. (Emphasis theirs)

The so-called findings of fact (except the fact that this work was no more arduous than many other chores of a roustabout—about which there was direct proof) all came after the above dispositive holding.

Furthermore, under the circumstances of this case it is clear the access hole was not improperly constructed and did not constitute an unreasonably dangerous place to work. The undisputed evidence in this case is that numerous seamen, including Erftmier's own crew, had been through the access hole many, many times without injury. It is clear that the only reason Erftmier was injured (if he was) is that he had an unknown pre-existing congenital or developmental spinal abnormality that ren-

dered him unusually susceptible to injury by bending over. In fact, Erftmier's first hospitalization was required after he injured his back while bending over in the shower *at home* to pick up a bar of soap (T. 36). Surely, Petitioner is not arguing that a Jones Act employer must design its vessels to accommodate seamen with possible, but unknown, back infirmities.

As to the matter of the access hole being raised six inches above the deck, members of Erftmier's own crew testified that water accumulated in the void space in question. Even if placing access holes above deck level is not a common practice generally, there was a clear purpose for it in this case—namely, to prevent water from migrating between compartments.[11]

Similarly, whether it is generally true that it is difficult to design access holes so that they are not near pipes, valves and conduits is immaterial. The undisputed evidence in the present case, including the photographic evidence relied upon by the court of appeals, shows that the access hole in question was aft of a boiler room and beneath a bathroom. The court of appeals, after stating

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11. In the final analysis, whether the bottom of the access hole was six inches above the deck, twelve inches above the deck or flush with the deck is irrelevant. Since the floor of the bathroom was at most three and one-half feet off the deck, the access hole could only have been six inches higher than it was. There was not a scintilla of evidence that the distance of the hole off the deck, six inches more or less, would have had any causal relationship to Erftmier's injury. Petitioner himself recognizes the ambiguous nature of the trial court's finding of negligence due to the access hole being six inches off the deck. The trial court did not make clear whether it felt the hole should have been higher or lower. Petitioner suggests it should have been higher. That being the case, the court of appeals' statement concerning the reason the access hole was off the floor (to prevent water from flowing between compartments) is totally irrelevant to Petitioner's position.

that it would be difficult to design passageways so that they would never be impaired by pipes and the like, then added, "This is especially true when the hole must be located below a bathroom and beside a boiler room." Thus, the court of appeals based its general observations on the specific facts of the present case—not the other way around.

As to the passage through the access hole being no more bothersome than many other chores a roustabout has to perform, there was direct evidence to support that statement. The evidence showed without dispute that chipping rust and repainting voids was commonplace work of roustabouts. (T. 136). The roustabouts who were actually working in the void had to work in a space only three to three and one-half feet high in a seated position for hours at a time. (T. 99; Loftin, p. 28). Furthermore, the court of appeals' general observation that a seaman's work is arduous is simply common knowledge. As the court of appeals noted, passage through the access hole may have been bothersome, but the fact remains that innumerable seamen passed through it many times without injury.

As to other vessels having access holes of similar size and shape, there was direct testimony of that fact by both Donald Kervin, who had worked in ship construction, and by Omar Nugent, who had worked on similar vessels for fourteen years. (T. 122-123, 173).

In summary, the statements of the court of appeals that Petitioner has mischaracterized as findings of fact are in reality either based on direct evidence or are reasonable inferences from direct evidence. In any event, *even if* the court of appeals' statements concerning

methods of construction of vessels generally are not viewed as reasonable inferences, it is hardly the role of this Court to correct such errors that affect only the parties to this case, and this is especially so where, as here, the errors, if any, are harmless.

III.

THE OPINION OF THE COURT OF APPEALS IS CORRECT WITHOUT REGARD TO THE ERRORS ALLEGED BY PETITIONER

In a nutshell, this is a case where a seaman with a pre-existing back abnormality, of which neither he nor his employer was aware, allegedly injured his back attempting to enter an access hole that had been traversed hundreds of times by scores of other seamen without any incident of injury. Erftmier's sole contention of negligence and of unseaworthiness of the vessel relates to the design and location of the access hole. Where improper design is the basis of the alleged negligence, the absence of injury to others is a persuasive rebuttal of that claim.[12] Moreover, a finding of negligence requires foreseeability, and the absence of injury to anyone despite frequent use of the instrumentality in question shows a lack of foreseeability.[13]

The court of appeals' decision does nothing more than combine those settled principles with the firmly established rule that a vessel owner is only obligated to fur-

12. *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1182 (5th Cir. 1971).

13. *Id.*

nish a *reasonably* safe vessel, not an accident-proof one.[14] The trial court's determination that the situs where Erftmier was allegedly injured was not a reasonable safe place to work violated those principles, and that decision was clearly erroneous, as the court of appeals correctly ruled.

CONCLUSION

The decision of the court of appeals, which turns solely on the facts of the present case and involves no novel issues of law, is not an appropriate case for the exercise of this Court's discretionary certiorari powers. The errors Petitioner contends were made by the lower court are not well taken, and even if they were, those alleged errors are not dispositive. The decision of the court of appeals is correct.

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14. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960); *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295 (5th Cir. 1977); *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675 (5th Cir. 1969), *cert. denied*, 396 U.S. 1037, 90 S.Ct. 682, 24 L.Ed.2d 681 (1970).

WHEREFORE, PREMISES CONSIDERED, Respondent Rowan Companies, Inc. respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Brief in Opposition have been mailed by certified mail, return receipt requested, to the attorney of record for Petitioner, Don R. Riddle, 5629 FM 1960, Suite 326, Houston, Texas 77069, on this 16th day of December, 1983.

THEODORE GOLLER